NO. SC94256

IN THE SUPREME COURT OF MISSOURI

RAY CHARLES BATE AND DEBORAH SUE BATE,

Plaintiffs-Appellants,

v.

GREENWICH INSURANCE COMPANY,

Defendant-Respondent.

Appeal from the Circuit Court of Boone County, Missouri
13th Judicial Circuit
The Honorable Christine Carpenter

DEFENDANT-RESPONDENT'S SUBSTITUTE BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Constitutional Provisions

Regulations

STATEMENT OF FACTS

Plaintiffs/Appellants Ray and Deborah Bate (hereinafter collectively "Plaintiffs") filed a lawsuit against Rocky T. Wells seeking damages for personal injuries they claimed to have sustained as a result of an automobile accident. (L.F. 12). On February 23, 2009, following a bench trial in which Plaintiffs presented evidence and Rocky Wells offered no evidence, a judgment was entered for Plaintiffs in the amount of $2,000,000 for Plaintiff Ray Bate and $1,000,000 for Plaintiff Deborah Bate. (L.F. 13).

Approximately one month later, Plaintiffs filed a petition against Cintas Corporation ("Cintas") and Cambridge Integrated Insurance. (L.F. 10-16). Several months later, Plaintiffs filed an amended petition adding Greenwich Insurance Company ("Greenwich") as a defendant, seeking underinsured motorist benefits under a policy of insurance which was purportedly issued by Greenwich, Cintas or Cambridge Integrated Insurance. (L.F. 11). Plaintiffs failed to file a copy of any insurance policy issued by any defendant with their Amended Petition, including Greenwich, in support of their claims. (L.F. 10-16). In addition, the Amended Petition did not allege that Plaintiffs were insureds or beneficiaries in a policy of insurance issued by Greenwich. (L.F. 10-16). Rather, Plaintiffs merely alleged that they were "insured under a policy issued by one or more of the defendants." (L.F. 11, 14).

Plaintiffs attempted to serve Greenwich, a Delaware insurance corporation, through Douglas M. Ommen, Missouri Director of Insurance, Truman Building, 301 West High Street, Room 63, Jefferson City, Missouri 65101. (L.F. 17-18). The summons to Greenwich was issued on August 25, 2009. (L.F. 41). However, the return indicates that copies of the summons and petition were not delivered to Douglas M. Ommen, Missouri Department of Insurance, or the Deputy Director or the Chief Clerk. Instead, the summons and Amended Petition were delivered to a Kim Landers, "Legal Mo. Dept. of Insurance" on August 31, 2009. (L.F. 41).

Thereafter, Plaintiffs dismissed their claims against defendants Cintas and Cambridge Integrated Services Group, Inc. and moved for a default judgment against Greenwich. (L.F. 3). On March 22, 2010, the trial court conducted a hearing and entered a default judgment against Greenwich. (LF. 4; Tr. 1-13). At the hearing, Plaintiff Ray Bate testified that he was a salesman employed by Cintas. (Tr. 5, 6). According to his testimony, Cintas furnished him with insurance for his own personal vehicle. (Tr. 6). He also testified that he signed a document from Cintas which explicitly informed him that Cintas had purchased the state minimum required coverage and that Cintas specifically did not purchase underinsured motorist coverage for Charles Bate. (Tr. 7). Counsel for Plaintiff Charles Bate argued that the policy was "complicated" and "ambiguous" and

therefore, it provided $5 million dollars in underinsured motorist coverage. (Tr. 9-12).

Following the hearing, the trial court entered a default judgment against Greenwich and in favor of Charles Bate for $2,000,000 and in favor of Deborah Bate in the amount of $2,000,000.00. (L.F. 4). Thereafter, Plaintiffs moved to correct the judgment. (L.F. 4). A corrected judgment was entered on March 29, 2010, awarding Charles Bate $2,000,000 and Deborah Bate $1,000,000. (L.F. 4 and 17-18).

Plaintiffs waited over a year before seeking to enforce the judgment. (L.F. 4). Upon learning of the default judgment, Greenwich filed a motion to set aside the default judgment pursuant to Rule 74.06 on multiple grounds. (L.F. 62-70). Specifically, Greenwich argued in its Amended Motion to Set Aside the Default Judgment that the default judgment(s) were void because the trial court lacked personal jurisdiction over Greenwich in that service and proof of service were insufficient; the default judgments violated Greenwich's due process rights provided under the Missouri and United States Constitutions; the trial court lacked subject matter jurisdiction; §375.906[1] without the additional requirements of Rules 54.15 and 54.20 violates the Equal Protection rights provided by the Missouri and

[1] All statutory references are to R.S.Mo. (2000) unless otherwise indicated.

United States Constitutions; and because it was no longer equitable that the judgment remain in force. (L.F. 62-70).

Greenwich further argued that Plaintiffs' failure to comply with the proof of service requirements of Missouri Supreme Court Rules 54.15 and 54.20 resulted in a void judgment. (L.F. 68-70). Greenwich also argued that Missouri courts have held that the Supreme Court rules provide minimum requirements upon parties which supplement the service procedure contemplated in §375.906. (L.F. 68-70). Greenwich further argued that the trial court lacked personal jurisdiction to enter the default judgment(s) because, to the extent that a statute and a Supreme Court Rule conflict as to a matter of procedure, the Supreme Court Rule must prevail. (L.F. 67-70). The arguments raised by Greenwich as to personal jurisdiction included assertions and supporting evidence that Plaintiffs were not permitted to utilize the service provisions of §375.906 and did not meet the requirements of § 375.906 because Plaintiffs were (1) not ***named*** beneficiaries to the policy in question, (2) the policy in question was not issued in the State of Missouri, and (3) that no liability to Plaintiffs for underinsured benefits could have accrued or matured in the State of Missouri because no underinsured motorist coverage was ever purchased by Cintas from Greenwich for the State of Missouri, where Ray Bate was employed and where Plaintiffs were allegedly injured. (L.F. 69). Greenwich also argued that Plaintiffs' Amended Petition failed to state a claim

against Greenwich, and that the trial court's default judgment was, therefore, void for lack of subject matter jurisdiction. (L.F. 65-67).

In support of its motion, Greenwich filed a copy of the policy of insurance purchased by Cintas from Greenwich for 2007-2008, a national policy which included separate policy provisions for each state in which Cintas operates, including the State of Missouri. (L.F. 106). The record establishes that Cintas rejected the option to purchase underinsured motorist coverage from Greenwich for the State of Missouri in the 2006-2007 policy. (L.F. 80, 106, 108). In 2007-2008, Cintas renewed all Missouri policy provisions contained within the 2006-2007 Greenwich policy, therefore opting once again not to purchase any underinsured motorist coverage for the State of Missouri. (L.F. 80, 106, 108). Cintas simply did not purchase or pay for any underinsured motorist coverage in the State of Missouri from Greenwich from 2006-2008. (L.F. 80, 106, 108). In fact, the insurance coverage purchased by Cintas from Greenwich specifically excluded any underinsured motorist coverage for the State of Missouri. (L.F. 80, 106, 108).

Plaintiffs opposed Greenwich's motion to set aside the default judgment, positing to the court that Rule 54.18 permitted them to serve Greenwich pursuant to the provisions of § 375.906 R.S.Mo. without complying with the proof requirements of Rules 54.15 and 54.20. (L.F. 133). The trial court held a hearing on Greenwich's Amended Motion to Set Aside the Default Judgment on October 1,

2012. (L.F. 7; Tr. 14-38). On January 29, 2013, the trial court entered a judgment, sustaining Greenwich's Amended Motion to Set Aside Default Judgment finding that there was no valid service of process and therefore, no personal jurisdiction. (L.F. 160).

Plaintiffs appealed the trial court's judgment setting aside the default judgment. (L.F. 157-160). In a unanimous decision, the Court of Appeals affirmed the trial court, finding that, under Missouri law, method and proof of service are distinct requirements. *Bate v. Greenwich*, No. WD 76086, 2014 WL1677670 *4 (Mo. App. W.D. April 29, 2014). The Court of Appeals explained that even, assuming arguendo, that Plaintiffs complied with the method of service in §375.906, Plaintiffs wholly failed to comply with the proof requirements set forth under Rules 54.14(b) and 54.20(c). *Id*. at 4-5. The Court of Appeals denied the Plaintiffs' motion for rehearing and application to transfer.

Thereafter, Plaintiffs sought transfer from this Court which was granted.

POINT RELIED ON

The trial court properly set aside the default judgment because the judgment was void and it was no longer equitable to remain in place, in that: (1) the trial court lacked personal jurisdiction over Greenwich because Plaintiffs failed to satisfy the proof of service requirements in Rules 54.15 and/or 54.20; (2) Section 375.906 R.S.Mo. was not applicable because no policy was issued in Missouri and no liability arose in Missouri; (3) even if applicable, the requirements of §375.906 were not satisfied as there was no service on the director, deputy director, or chief clerk of the Department of Insurance; (4) the failure to comply with the requirements of Rules 54.15 and/or 54.20 denied Greenwich due process; and (5) application of §375.906 without the supplemental requirements of Rule 54.20 violates due process and equal protection afforded by the United States and Missouri Constitutions.

ARGUMENT

A. Standard of Review.

Generally, a court's ruling on a motion to set aside a judgment under Rule 74.06 is reviewed for an abuse of discretion. *See O'Hare v. Permenter*, 113 S.W.3d 287, 289 (Mo. App. E.D. 2003); *Medlin v. RLC, Inc.*, 423 S.W.3d 276, 283 (Mo. App. S.D. 2014). However, whether a judgment should be vacated as void is a question of law that this Court reviews *de novo*. *Id.* A judgment is void if the circuit court that rendered it: (1) lacked subject matter jurisdiction; (2) lacked personal jurisdiction; or (3) entered judgment in a manner that violated due process. *Sieg v. International Envtl. Mgmt., Inc.*, 375 S.W.3d 145, 149 (Mo. App. W.D. 2012).

B. The Trial Court Properly Set Aside the Default Judgment.

It is a well-established principle of Missouri law that our courts disfavor default judgments and prefer that cases be decided on the merits of the case. *Agnello v. Walker*, 306 S.W.3d 666, 673 (Mo. App. W.D. 2010). Under Rule 74.06(b), the court may relieve a party or his legal representative from a final judgment that has been entered for one year or longer if the judgment is void, has been satisfied, released, or discharged, a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment remain in force. Rule 74.06(b)(4) and (5). A defendant may file a motion

contending that a judgment is void at any time. *Ground Freight Expeditors, LLC v. Binder*, 407 S.W.3d 138, 141 (Mo. App. W.D. 2013). A judgment is void under Rule 74.06(b)(4) only if the circuit court that rendered it (1) lacked subject matter jurisdiction; (2) lacked personal jurisdiction; or (3) entered the judgment in a manner that violated due process. *Sieg v. International Envtl. Mgmt., Inc.*, 375 S.W.3d at 149.

1. <u>The Default Judgment was Void for Lack of Personal Jurisdiction</u>.

It is a fundamental precept of jurisprudence in this nation that the rights of a party may not be adjudicated in the absence of notice to that party of the pendency of the litigation. *Industrial Pers. Corp. v. Corcoran*, 643 S.W.2d 816, 818 (Mo. App. E.D. 1981). Such notice is the fundamental purpose of service of process. *Id.* Valid service of process is a prerequisite to personal jurisdiction, and failure to comply with statutory requirements of process deprives the court of authority to adjudicate." *Maddox v. State Auto. Mut. Ins. Co.*, 356 S.W.3d 231, 233 (Mo. App. E.D. 2011). In order to protect this guarantee of due process, the courts and legislative bodies have devised an elaborate set of rules. *Industrial Pers. Corp. v. Corcoran*, 643 S.W.2d at 818. One aspect of the rules is to insure that in fact notification reaches the defendant. *Id.* These provisions relate to the persons who may be served who are deemed sufficiently reliable to insure notification will, in

fact, be given to the defending party. *Id.* These rules deal with the method by which service may be effectuated.

The second aspect of the rules concerns the proof required to establish service has been obtained. This is the province of Rule 54.20. *Id.* Rule 54.20 establishes the proof which must be presented to the court to establish that, in fact, the defendant has been notified of the pendency of the action. *Id.* It is well established that in the absence of such proof, the court does not have jurisdiction to determine the rights of the defendant. *Id.*

When a court enters a judgment when no valid personal jurisdiction has been obtained over the defendant, the judgment is void. *Id*. In other words, proof of service of process on a defendant is a prerequisite to the court's exercise of personal jurisdiction over the defendant. *Cook v. Polineni*, 967 S.W.2d 687, 690 (Mo. App. E.D. 1998). Furthermore, the service of process must conform to the manner and form established by law to invoke the court's jurisdiction. *Maddox v. State Auto Mut. Ins. Co.*, 356 S.W.3d at 233.

a. *Requirements of Rules 54.15 and 54.20 Not Met.*

In the present case, the trial court lacked personal jurisdiction over Greenwich because Plaintiffs failed to comply with mandatory service and proof of service provisions of Rules 54.15 and 54.20 and §375.906. The trial court set aside the default judgment against Greenwich because there was no valid service of

process on Greenwich and therefore, the court lacked personal jurisdiction over Greenwich. (L.F. 160). Because the court lacked personal jurisdiction over Greenwich at the time judgment was entered, the judgment was void and properly set aside.

To establish the proof necessary to supply the circuit court with personal jurisdiction over a foreign insurance company authorized to conduct business in the State of Missouri, the requirements of Rule 54.15 and Rule 54.20(c) must be met. *Maddox v. State Auto Mut. Ins. Co.*, 356 S.W.3d at 233. In *Maddox*, the Court affirmed the circuit court's setting aside of a previously entered default judgment against a foreign insurance company. In *Maddox*, the plaintiff argued that the circuit court erred in setting aside the default judgment because the requirements of §375.906 had been met. The Court of Appeals in *Maddox* disagreed, finding that the requirements of Rules 54.15 and 54.20(c) are separate and must ***also*** be met by a defendant in order to take a default judgment. *Id*. at 233-234. The Court explained as follows on page 234:

> Rule 54.15 supplements section 375.906 by additionally requiring the Director to request a signed return receipt from the addressee when forwarding the pleadings. "Rule 54.20 establishes the proof which must be presented to the court to establish that, *in fact* the defendant has been notified of the

> pendency of the action. In the absence of proof of service mandated by the Rule the court lacks the proof established by the Supreme Court as necessary to determine that the court has jurisdiction of the person of the defendant." [Citations omitted]. "In the absence of such proof, the court does not have jurisdiction over the defendant, unless he has consented to such jurisdiction or has waived the objection to personal jurisdiction." [Citation omitted].

(Emphasis in original). Rule 54.15 provides in pertinent part as follows:

> **Service on Secretary of State, Secretary of Public Service Commission and Director of Insurance.**
>
> (a) **Service of Process**. Service of process on the secretary of state, secretary of the public service commission or director of insurance shall be made by serving a copy of the summons and petition, together with any remittance fixed by statute, on the respective official. The service of process shall be made as provided in Rule 54.13 or Rule 54.16.
>
> (b) **Notice to Defendant**. The … director of the department of insurance shall forthwith mail to the defendant at the defendant's last known address a copy of such service and a

> copy of the summons and petition. The *mailing shall be by registered or certified mail requesting a return receipt signed by addressee only*.

(Emphasis supplied). Rule 54.20 provides in pertinent part as follows:

> **Proof of Service**
>
> (c) **Certificate of Secretary of State, Secretary of Public Service Commission and Director of Insurance – Mailing of Notice**. The notice specified in Rule 54.15 shall be provided by the affidavit of the official mailing of such notice. The affidavit shall be endorsed upon or attached to the original papers to which it relates and it, together with the returned registered or certified mail receipt shall be forthwith filed in the court in which the action is pending.

Rule 54.20 sets forth the proof that a plaintiff ***must*** show the court to establish that the proper method of service has been followed. *Walker v. Gruner*, 875 S.W.2d 587, 588 (Mo. App. E.D. 1994); *Russ v. Russ*, 39 S.W.3d 895, 897 (Mo. App. E.D. 2001). In the absence of proof of service, which is mandated by Rule 54.20, the court lacks the proof necessary to determine if the court has jurisdiction over the defendant. *Russ*, 39 S.W.3d at 897. In the absence of such proof, the court does not have jurisdiction over the defendant. *Id.*

Rule 54.20(c) specifically requires the Director of the Department of Insurance to provide an affidavit of the mailing of the pleadings together with the returned receipt in order to prove compliance with the notice requirement of Rule 54.15. Furthermore, Rule 54.20(c) requires that the affidavit include the returned registered or certified mail receipt.

In the present case, the proof requirements of Rule 54.15 and Rule 54.20(c) were simply not met by Plaintiffs. Specifically, the affidavit attached to Plaintiffs' Reply to Defendant's Motion to Set Aside Judgment Pursuant to Rule 74.06(b) indicates only that the process was mailed by first class mail, not by registered or certified mail as required by Rule 54.15. (L.F. 42). In addition, the affidavit filed by Plaintiffs in opposition to the motion to set aside the default judgment failed to include a mail receipt that indicates that Greenwich ***in fact*** received the documents as required by Rule 54.20. (L.F. 42).

Missouri courts have long held that the requirements for proof of service are separate requirements that must be satisfied before a court may determine the rights of the defendant. *Industrial Personnel Corp. v. Corcoran*, 643 S.W.2d at 818. As stated above, the Court in *Maddox* held that the requirements of Rules 54.15 and 54.20 are separate requirements must be met ***in addition*** to the requirements set forth in §375.906. Similarly, in *Grooms v. Grange Mut. Cas. Co.* 32 S.W.3d 618 (Mo. App. E.D. 2000), the Court of Appeals affirmed the setting

aside of a default judgment against an insurer because of insufficiency of service. The plaintiff in *Grooms* argued that service was sufficient under §375.906. The insurer argued that service was insufficient despite the fact that the Director of Insurance was served with the petition and summons. In finding service insufficient, the Court of Appeals held that the Department of Insurance was required to mail the documents to the insurer by certified or registered mail with return receipt. The Court explained on page 621:

> This Court has previously held that both Rule 54.15 and Section 375.261 R.S.Mo. (1994), require that the Director mail to the defendant a copy of the summons and petition by registered or certified mail with return receipt signed by the addressee. *Schuh Catering, Inc. v. Commercial Union Ins. Co*., 932 S.W.2d 907, 908 (Mo. App. E.D. 1996). Rule 54.20 establishes the proof that must be presented to the court to establish that the defendant has in fact been notified of the pendency of the action. *Id*. "In the absence of proof of service mandated by the Rule the court lacks the proof established by the Supreme Court as necessary to determine that the court has jurisdiction of the person of the defendant." *Id*., citing

Industrial Personnel Corporation v. Corcoran, 643 S.W.2d 816 (Mo. App. 1981).

Plaintiffs rely heavily upon the Eastern District's decision in *Strong v. American States Preferred Ins. Co*., 66 S.W.3d 104 (Mo. App. E.D. 2001) in attempting to argue that proof of service upon Greenwich using certified or registered mail was not required. The Court in *Strong* did not address the requirement of proof of service under Rule 54.20 in its analysis of that case. Rather, the defendant in *Strong* only argued that plaintiff failed to comply with §375.261, while plaintiff argued that it complied with §375.906. As between these two ***alternate*** service statutes, the Court in *Strong* held that plaintiff had the option as to which statute under which to serve the defendant with process.

The court's analysis in *Strong* as to ***alternate*** service statutes has no bearing on the instant matter in which Greenwich has argued that Rules 54.15 and 54.20 provide additional proof of service requirements to those contained within §375.906 when taking a default judgment. As discussed above, the fact that the requirements in Rule 54.15 and Rule 54.20 are separate from the proof requirements of §375.906, was addressed explicitly in *Maddox*. In *Maddox*, the Court noted as follows on page 234:

> The issue [of compliance with §375.906] is not determinative because regardless, the record is still devoid of proof that [the

> insurer] was *in fact* given notice as required by Rule 54.20(c). Therefore, we should decline to reach the merits of the claim. Second, for the reasons discussed above, the original default judgment was void when entered.

(Emphasis in original). The decision in *Maddox* is not only more recent than the decision in *Strong*, it also squarely addresses the issue at hand. Furthermore, *Maddox* is consistent with decades of Missouri law in its interpretation of Rule 54.20. *See e.g., Industrial Personnel Corp. v. Corcoran*, *supra*. *Strong* did not address the issue of the proof requirements of Rules 54.15 and 54.20. The *Maddox* court specifically held that compliance with §375.906 is not determinative of proper service because regardless of whether or not the requirements of §375.906 are met, the record was still devoid of proof that [the insurer] was ***in fact*** given notice as required by Rule 54.20(c) and due process. The *Maddox* Court also expressly held that the requirements of Rules 54.15 and 54.20 are additional requirements to those contained in §375.906. Here, as discussed below, the record indicates that compliance with the requirements of §375.906 was not established. Furthermore, there is no evidence that Greenwich was, in fact, given notice pursuant to the requirements of Rule 54.20(c).

In addition, Plaintiffs' claim that Greenwich's reliance upon *Maddox* is inappropriate because *Maddox* is *dicta* is simply incorrect. "When a court bases its

decision on two distinct grounds, each is as authoritative as the other and neither is obiter dictum." *Estate of Nelson v. Missouri Dep't of Soc. Servs., MO HealthNet Div.*, 363 S.W.3d 423 (Mo. App. W.D. 2012). In *Maddox*, the court's decision was based upon *both* the minimum service of process provisions determined by the Missouri Supreme Court in Rules 54.15 and 54.20 ***and*** the issue of whether mere compliance with §375.906 would provide a defendant with sufficient notice.

Missouri courts have consistently held that the requirements of Rule 54.20 must be met even when service is attempted pursuant to a statutory method. *Industrial Personnel Corp. v. Corcoran*, 643 S.W.2d at 818. More specifically, Rules 54.15 and 54.20 supplement §375.906. *Grooms*, 32 S.W.3d at 618; and *Maddox*, 356 S.W.3d 231 at 234. This Court denied transfer in *Maddox*, allowing the decision to stand as authority in the State of Missouri. Plaintiffs are seeking to overturn decades of Missouri law so the default judgment may be reinstated and they can avoid a determination of the merits of their claim.

Supreme Court Rules are interpreted by applying the same principles used for interpreting statutes. *State ex rel. Vee-Jay Contracting Co. v. Neill*, 89 S.W.3d 470-71 (Mo. banc 2002). It is well established that after a statute or, in this case, a rule has been settled by judicial construction, the construction becomes as much a part of the statute or rule as the text itself. *See Barker v. St. Louis County*, 104 S.W.2d 371 (Mo. 1937). Therefore, a change of decision as to the application or

construction of the statue or rule is to all intents and purposes the same as an amendment of the law. *Id*. at 378. Because of these well-established principles, this Court has indicated that it has no hesitation in "saying that the rights of the parties are to be determined according to the law as it was judicially construed" when the action was taken. *Id*. Accordingly, in this case, §375.906 and Rule 54.20 should be applied to the default judgment according to the judicial construction that has existed for decades.

b. *Rule 54.18 Does Not Eliminate the Proof Requirements of Rule 54.20.*

Plaintiffs do not dispute that the requirements of Rules 54.15 and 54.20 were not met here. Instead, Plaintiffs argued before the trial court and now before this Court that, pursuant to Missouri Court Rule 54.18, they were not required to comply with Rules 54.15 and 54.20 because service was obtained pursuant to §375.906. This argument, however, was rejected by the Court in both *Maddox* and *Grooms*. The *Maddox* Court explicitly held that the requirements under Rules 54.15 and 54.20 are ***additional*** requirements that also apply when service is sought pursuant to §375.906. Furthermore, to the extent that it is viewed that Rules 54.15 and 54.20 conflict with §375.906, it is well settled that if there is a conflict between a statute and a Supreme Court Rule, the Rule supersedes the statute. *See McMinn v. McMinn*, 884 S.W.2d 277 (Mo. App. W.D. 1994). Rule 54.18 does not

allow a party to usurp this Court's mandated proof requirements when taking a default judgment by utilizing a statutory service provision which fails to comply with this standard.

Plaintiffs' contention that compliance with §375.906 eliminates the proof requirement of Rule 54.20 fails. As discussed above, Missouri courts have held that the requirements of Rules 54.15 and 54.20 are additional proof requirements which are separate from the service provisions contained in §375.906. Plaintiffs' argument confuses the difference between the ***method*** of service and ***proof*** of service. Furthermore, the provisions of §375.906 are not applicable to the present case nor was there compliance with the procedures set forth in §375.906.

Rule 54.20 establishes the proof which must be presented to establish that, in fact, the defendant has been notified of the pendency of the action. *Industrial Personnel Corp. v. Corcoran*, 643 S.W.2d at 818; *see also T.W.I. Investments, Inc. v. Pacific Aggregates, Inc.*, 726 S.W.2d 807, 809 (Mo. App. E.D. 1987). In the absence of proof of service in accord with the rule, the court lacks the proof established by the Supreme Court as necessary to determine that the court has jurisdiction of the person of the defendant. *Id*. In the absence of such proof, the court does not have jurisdiction to determine the rights of the defendant. Furthermore, a return of service must establish on its face that every requisite of the statute has been complied with. *State ex rel. Boll v. Weinstein*, 295 S.W.2d 62

(Mo. banc 1956) (overruled on other grounds by *State ex rel. DePaul v. Mummert*, 870 S.W.2d 820 (Mo. banc 1994).

In *Industrial*, the Court of Appeals ordered the trial court to set aside a default judgment against an out-of-state corporate defendant. *Id*. at 819. The plaintiffs in *Industrial* argued that they had fully complied with the statutory requirements for long-arm service. *Id*. at 818. The plaintiffs further argued, as the Plaintiffs do in the present case, that Rule 54.18 allows service in accord with the provisions of a statute and therefore, plaintiffs were not required to satisfy the additional requirements of Rule 54.20. *Id*. The Court of Appeals rejected the plaintiffs' argument holding that compliance with the statute was insufficient because the plaintiffs failed to meet the separate requirements for proof of service set forth in Rule 54.20. *Id.* The Court explained that plaintiffs failed to recognize the difference between the method of service and proof of service. Plaintiffs' arguments in the present case also suffer from this same deficiency.

The cases cited by Plaintiffs are inapposite as they do not address ***proof*** of service, much less "***proof***" pursuant to Rules 54.15 and 54.20. For example, *Collector of Revenue of City of St. Louis v. Parcels of Land Encumbered with Delinquent Tax Liens*, 585 S.W.2d 486 (Mo. banc 1979), addresses the constitutionality of the Municipal Land Reutilization Law and the method of service thereunder which included publication. This Court did not discuss the

requirements for proof of service including Rules 54.15 and 54.20. In *Hometown Lumber and Hardware, Inc. v. Koelling*, 816 S.W.2d 914 (Mo. banc 1991), this Court addressed certain insufficiencies in a summons and "whether these insufficiencies rendered the summons jurisdictionally fatal." The *Hometown* decision does not discuss any ***proof*** requirements including Rules 54.15 or 54.20. Similarly, in *State ex rel. Nixon v. Overmyer*, 189 S.W.3d 711 (Mo. App. W.D. 2006), the Court of Appeals applied the Missouri Incarceration Reimbursement Act in determining requisite process upon an inmate; the proof of service requirements contained in Rules 54.15 or 54.20 were not addressed.

Recently, in *Christensen v. Goucher*, 414 S.W.3d 584 (Mo. App. W.D. 2013) declined to find a lack of jurisdiction based on deficiencies in the original proof of service that was not notarized and failed to include an affidavit of the process server. In *Christensen*, an amended affidavit was filed that fulfilled the requirements of Rule 54.20. In declining to extend the holdings in *T.W.I. Investments* and *Industrial Personnel*, this Court noted that those cases do not discuss the effect of an amendment of a defective return of service to comport with the facts of service. Here, like *Industrial Personnel* and *T.W.I. Investments* and unlike *Christensen*, no amended return of service was filed. More importantly, the facts of service in the present case fail to satisfy the requirements of Rules 54.15

and 54.20 and §395.906. Therefore, an amended return cannot remedy the deficiencies of service. The holding in *Christensen* is simply not applicable here.

c. *Section 375.906 Is Not Applicable To The Present Case.*

Alternatively, even if this Court were to find that the requirements of Rules 54.15 and 54.20 are not additional requirements to service under §375.906, service was still not proper under §375.906, on Greenwich as §375.906 is inapplicable under the facts of this case nor was there compliance with its requirements. In construing statutes, the court's primary responsibility is to ascertain the intent of the General Assembly from the language used and to give effect to that intent. *Community Federal Sav. & Loan Ass'n. Director of Revenue,* 752 S.W.2d 794 (Mo. banc 1988). Where the language of a statute is clear and unambiguous, there is no room for construction. *Id*. Section 375.906, and its predecessor §375.210, provide a method for obtaining service upon foreign insurance corporations. *Crabtree v. Aetna Ins. Co.*, 111 S.W.2d 103, 108-09 (Mo. banc 1937). A return of process pursuant to §375.906, a departure from the common law requirement of personal service, is insufficient to confer jurisdiction over the person of a defendant unless the plaintiff affirmatively shows, under strict construction, strict compliance with all requirements of the statute authorizing such service. *Id.* Plaintiffs mistakenly contend that they have effectuated service pursuant to

§375.906. Service made pursuant to §375.906 is only permissible in the limited situations described within §375.906. In relevant part, this section provides that:

> …service as aforesaid shall be valid and binding in all actions brought by residents of this state upon any ***policy issued or matured***, or upon any ***liability accrued in this state, or on any policy issued in any other state in which the resident is named as beneficiary***, and in all actions brought by nonresidents of this state upon any policy issued in this state in which the nonresident is named beneficiary or which has been assigned to the nonresident, and in all actions brought by nonresidents of this state on a cause of action, other than an action on a policy of insurance, which arises out of business transacted, acts done, or contracts made in this state.

(Emphasis added). As discussed more fully below, Plaintiffs did not meet any of the above described prerequisites and were, therefore, not entitled to utilize §375.906 to perpetuate service upon Greenwich.

i. *No Policy Was Issued and No Liability Accrued or Matured Within the State of Missouri*.

Under §375.906, a plaintiff may utilize the service provisions found therein, as supplemented by the requirements of Rules 54.15 and 54.20(c) when the claim

arises under any policy which is issued or matured in Missouri or upon any liability which has accrued in the State of Missouri. A claim for underinsured motorist coverage is a contract action that arises from the policy. *Taylor v. Farmers Ins. Co., Inc.*, 954 S.W.2d 496 (Mo. App. S.D. 1997). A renewal is also a contract with the same terms and conditions as those contained in the policy which is renewed. *Id*.

Plaintiffs' First Amended Petition for Payment of Proceeds of Insurance Policy (L.F. pp. 10-16) states that Plaintiffs are residents of the State of Missouri. (L.F. 11, ¶1; 13 ¶19). Plaintiffs allege that they were involved in a motor vehicle accident. (L.F. 11 ¶6; 14, ¶24). Plaintiffs' brought their lawsuit against Greenwich and others, citing that "upon information and belief," Greenwich or one of the other defendants had issued a policy of insurance that included underinsured motorist coverage. (L.F. 11, ¶ 5). Plaintiffs' essentially allege that Cintas, the named insured under the policy in question,[2] was Ray Charles Bate's employer at the time of the collision. [3]

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[2] Plaintiffs never actually alleged the named insured or identified a policy number or effective dates for the presumed "policy" in question. Plaintiffs attached no contract at all to their contract action. For the sake of this argument, Greenwich

On July 1, 2006, Greenwich issued an insurance policy to Cintas. (L.F. 80). Greenwich issued this policy to Cintas in the State of Ohio, where Cintas maintains its principal place of business. (L.F. 80). This policy contained no underinsured motorist coverage, and, in fact, the insured, Cintas, explicitly and unambiguously rejected any underinsured motorist coverage insurance in the State of Missouri. (L.F. 80, 106, 108). On July 1, 2007, Cintas renewed its policy with Greenwich. (*See* L.F. 80, 106, 108). This renewal was again issued in the State of Ohio. (*See* L.F. 80, 106, 108).

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presumes Plaintiffs were referring to the policy issued by Greenwich to Cintas, L.F. 83, 109.

[3] Plaintiffs never alleged in the First Amended Petition that Ray Charles Bate was employed by Cintas Corporation, and, therefore, was entitled to any coverage that may have been applicable and/or available to him at the time of the accident. Plaintiffs also never alleged how such coverage may apply to Deborah Sue Bate. For the sake of argument here only Greenwich presumed Ray Charles Bate's employment by Cintas was the basis for the Plaintiffs' claims for any entitlement to benefits under the "policy" allegedly in question.

Under Missouri law, the Greenwich policy, as renewed by Cintas, constituted a new contract but with the same terms and conditions as those contained in the policy which preceded it. *See Resolution Trust Corp. v. American Cas. Co. of Reading, PA*, 874 F.Supp. 961, 967 (E.D. Mo. 1995); (L.F. 118-21). Greenwich established that there were no endorsements or amendments to the terms of the 2006-2007 policy (L.F. 80, 106, 108) at the time of the renewal of said policy for the 2007-2008 (L.F. 108) which would have added underinsured motorist coverage. The policy issued in 2006 (L.F. 80) by Greenwich to Cintas did not provide underinsured motorist coverage to Plaintiffs, which is abundantly clear from Cintas' express rejection of such coverage. (L.F. 108). Therefore, Greenwich proved to the trial court that the "policy" (Underinsured Motorist Coverage) under which Plaintiffs sued for contractual benefits ***did not even exist at the time of the alleged accident***, at least to the extent of any alleged underinsured motorist benefits which Plaintiffs sought to recover.

With the effective dates of the policies and the location of the issuance clear on the face of the policies, the action commenced by Plaintiffs against Greenwich was not based on an Underinsured Motorist "policy," coverage or form which had been issued in the State of Missouri. Further a "policy," coverage or form which is not even in existence cannot have "matured" or "accrued" in the State of Missouri absent its creation/issuance. Therefore, Plaintiffs did not properly bring their action

against Greenwich as the policy, under the terms as it existed, was not issued in Missouri, nor did it mature or accrue therein.

ii. *Plaintiffs are Not the Named Beneficiaries or Assignees of Any Benefits Under the Policy in Question*.

Under §375.906, a plaintiff may utilize the service of process provisions found therein when the plaintiff is the named policy beneficiary or an assignee of benefits under the policy in question. Plaintiffs are not the ***named*** beneficiaries of the policy in question in the present case. (L.F. 80, 106). Further, Plaintiffs have never claimed that a named beneficiary has assigned its/his rights to Plaintiffs, as is also permitted under the language of the statute.

Plaintiffs were not entitled to serve Greenwich with process under the limited situations set forth in the plain language of §375.906. The policy in question was issued in the State of Ohio, rather than Missouri. Further, the policy in question could not have "matured" or "accrued" in the State of Missouri as discussed more fully above. Finally, Plaintiffs are not the named beneficiary to the policy at issue, nor are they an assignee to such a benefit. Therefore, Plaintiffs purported use of §375.906, was not permissible under the plain language of the statute in the present case. Therefore, alternatively, even if this Court were to conclude, contrary to decades of Missouri precedent, that the requirements of Rule

54.15 and 54.20 do not have to be satisfied, Plaintiffs still have not and cannot establish that the requirements and procedures under §375.906 were met in the present case.

d. *Plaintiffs Have Not Complied with Section 375.906.*

Section 375.906.2 provides:

> 2. Service of process shall be made by delivery of a copy of the petition and summons to the director of the department of insurance, financial institutions and professional registration, the deputy director of the department of insurance, financial institutions and professional registration, or the chief clerk of the department of insurance, financial institutions and professional registration at the office of the director of the department of insurance, financial institutions and professional registration at Jefferson City, Missouri, …

The summons and return filed with the trial court indicates that a copy of the summons and a copy of the petition were delivered to a Kim Landers with the title listed as "Legal Mo. Dept. of Insurance." The return on its face indicates that service was not made by delivering a copy of the summons on the director of the department of insurance, the deputy director or the chief clerk of the department of insurance as required by §375.906. The 2009 Official Manual for the State of

Missouri states that in 2009, Kim Landers was a senior office support assistant (keyboard). www.sos.mo.gov/BlueBook/2009-2010/10_Personnel_2.pdf#p.1259. As discussed above, Missouri courts have held that the provisions of §375.906 must be strictly construed and that the return must affirmatively demonstrate, under strict construction, compliance with all essential requirements of the statute. *See Crabtree v. Aetna Life Ins. Co*., 111 S.W.2d 103, 108 (Mo. 1937). Here, the return fails to demonstrate strict compliance as service was not on the director, deputy director or the chief clerk. Furthermore, at the time the judgment was entered, there was no proof that the remaining provisions of §375.906 were satisfied. Specifically, no affidavit establishing that the requirements of §375.906.5 regarding the mailing of the summons and petition to Greenwich was in the court's file. (L.F. 1-5).

Plaintiffs reference 20 C.S.R. 800-2.010, in arguing that service complied with the requirements of §375.906. (Appellants' Brief p. 30). Section 374.045 grants the Director of Insurance certain powers. It states:

> 1. The director shall have the full power and authority to make all reasonable rules and regulations to accomplish the following purposes:

> (1) To regulate the internal affairs of the department of insurance, financial institutions and professional registration;
>
> (2) To prescribe forms and procedures to be followed in proceedings before the department of insurance, financial institutions and professional registration; and
>
> (3) To effectuate or aid in the interpretation of any law of this state in this chapter, chapter 354, chapters 375 to 385, or as otherwise authorized by law.

However, despite the grant of certain regulatory powers to the Department of Insurance, Financial Institutions and Professional Registration under § 374.045, §374.045.3 provides that "No rule or regulation shall conflict with any law of this state." Here, the regulation appears to conflict with the provisions of §375.906. 20 C.S.R. 800-2.010(1), Service on Authorized Foreign and Alien Insurers, states:

> (A) Service of process on foreign and alien insurance companies authorized to do business in this state is made by delivery to the director, deputy director or ***a designee*** of the director….

(Emphasis added). The above regulatory provision, to the extent it is construed as permitting service on individuals beyond those listed in the statute, is inconsistent

with "[t]he well-established rule … that regulations may be promulgated only to the extent of and within the delegated authority of the statute involved." *Parmley v. Missouri Dental Bd.*, 719 S.W.2d 745, 755 (Mo. banc 1986). "When there is a direct conflict or inconsistency between a statute and a regulation, the statute which represents the true legislative intent must necessarily prevail." *Id*. Further, Missouri law is clear that an administrative agency's regulations are void if they are beyond the scope of the legislative authority conferred upon the state agency or if they attempt to extend or modify the statutes. *See Community Bancshares, Inc. v. Secretary of State*, 43 S.W.3d 821, 824 (Mo. banc 2001); *Brown-Forman Distillers Corp. v. Stewart*, 520 S.W.2d 1 (Mo. banc 1975); *Brown v. Melahn*, 824 S.W.2d 930, 933 (Mo. App. E.D. 1992).

If 20 C.S.R. 800-2.010 is construed as permitting service on individuals, other than the director, deputy director, or chief clerk, such as Kim Landers, the regulation is in conflict and inconsistent with §§375.906.1 and 375.906.2. Such a construction would expand and conflict with §375.906's procedure for effecting service of process on foreign insurance companies. Furthermore, the regulation would exceed the authorization set forth in §374.045. The plain and ordinary language of §.2 provides that service of process shall be made on the director, deputy director or chief clerk of the Department of Insurance, Financial Institutions and Professional Registration. In contrast, 20 C.S.R. 800-2.010(1)(A)

inconsistently states that service of process may be made by delivery to the director, deputy director or "***a designee of the director***." Due to the direct conflict and inconsistency between the regulation and the statute, the clear language of the statute must prevail, as this represents the true legislative intent. *See Parmley*, 719 S.W.2d at 755.

Additionally, 20 C.S.R. 800-2.010(1)(A) purports to extend and modify the service requirements as set forth in §375.906.2. Whereas §375.906.2 requires that service of process be directed to the director, deputy director or the chief clerk of the Department of Insurance, Financial Institutions and Professional Registration, 20 C.S.R. 800-2.010(1)(A) attempts to modify the irrevocable power or attorney and expend the authorized agents of the foreign insurance companies authorized to do business in the State of Missouri. *See* §§ 375.906.1 and 375.906.2. Clearly, the director, deputy director or "***a designee of the director***" is different from, and the more expansive than, the director, deputy director or chief clerk. The regulation is not allowed to extend and modify the procedure set forth within the statute.

Finally, the provisions of 20 C.S.R. 800-2.010(1)(A) actually exceed the power given to the director in §374.045. First, the provision that service may be directed to "***a designee of the director***," is in contradiction to §375.906.2. Second, the regulation does not accomplish the purpose of "regulat[ing] the internal affairs of the department of insurance, financial institutions and professional registration.

See §374.045.1(1). Further, it does not accomplish the purpose of "prescribe[ing] forms and procedures to be followed in proceedings before the department of insurance, financial institutions and professional registration. *See* §374.045.1(2). Finally, it does not accomplish the purpose of "effectuat[ing] or aid[ing] in the interpretation of any law of this state in this chapter [374], chapter 354, [or] chapters 375 to 385…." *See* §374.045.1(3). Instead, 20 C.S.R. 800-2.010(1)(A) attempts to expand the class of persons eligible to receive service of process on behalf of a foreign insurance company, in direct violation of Missouri law, as set forth in §§375.906.1, 375.906.2 and 374.045. Therefore, §375.906.2 must prevail.

In the present case, the requirements of §375.906 were simply not satisfied. The trial court's January 29, 2013 order setting aside the default judgment was proper and should be affirmed. Plaintiffs' attempted service upon Greenwich pursuant to §375.906 was not permitted and was insufficient under the plain language of the statute and the default judgment against Greenwich was void.

2. Default Judgment Violates Due Process Rights.

As demonstrated in *Maddox*, service of process as described by Missouri §375.906 ***alone*** falls short of the definition of due process requirements defined by Rules 54.15(b) and 54.20(c). Under §375.906, the Director of the Department of Insurance is required to send via first class mail a copy of the summons and petition to the insurance company. Section 375.906 does not meet the requirements

of Rules 54.15(b) and 54.20(c) for proper service of process. Whereas the Court Rules as set forth herein above require a mailing of the summons and petition to the defendant via registered or certified mail, as well as a filing of the affidavit and certified mail receipt with the Court, §375.906 if applied without the supplements of 54.20(c) and 54.15(b), permits service to be effectuated by first class mail and requires no return receipt or other assurance that the defendant ***actually*** received notice.

Missouri Courts have held that service by first class mail, as prescribed in §375.906, is insufficient to effectuate service on a foreign insurance company, notwithstanding its appointment of the Missouri Director of Insurance as a power of attorney. *See e.g. Maddox*, 356 S.W.3d at 234. Mere compliance with §375.906 is insufficient, because the statute does not meet the minimum due process requirements of Missouri Court Rules 54.15(b) and 54.20(c). Nor does compliance with §375.906 alone meet the requirements of the Due Process Clause of the Fourteenth Amendment of the United States Constitution, U.S.C.A. Const. Amend. XIV, § 1 and Article 1, Section 10 of the Missouri Constitution. Here, it is arbitrary and unreasonable to allow service upon a foreign insurer without any safeguards to assure that the insurer receives actual notice. Furthermore, the record in the present case establishes that service was not made on the Director of the Department of Insurance or the statutorily authorized individuals to receive service. Greenwich

never appointed Kim Landers as its agent to receive service of process. This coupled with the fact that there is no showing of actual notice violates Greenwich's due process rights.

In the present case, Greenwich proved, in support of its Amended Motion to Set Aside the Default Judgment, that neither Plaintiffs nor the Director of the Department of Insurance mailed a copy of service and a copy of the summons and petition to Greenwich via registered or certified mail. (L.F. 41-42). Further, no notice of service by registered or certified mail was filed with the trial court in the form of the affidavit of the mailing or the return registered or certified mail receipt. In addition, the return establishes that the summons and petition were not delivered to the director, deputy director, or chief clerk of the Department of Insurance as required by §375.906. Moreover, at the time judgment was entered no affidavit established that the requirements of §375.906.5, namely that the summons and petition, as set forth by §375.906, were mailed by first class mail to the insurance company were satisfied. (L.F. 1-9). In fact, Plaintiff acknowledge that the mailing of the summons and petition is a necessary step to perfect service under §375.906. (*See* Appellants' Brief p. 22). Furthermore, the due process, service and proof of service requirements under Missouri Court Rules 54.15(b) and 54.20(c) were simply not met in the present case. (L.F. 41-42).

The default judgment against Greenwich was set aside because Greenwich established that Plaintiffs failed to obtain proper notice upon Greenwich by certified or registered mail as Missouri case law, Missouri Court Rules, and due process each require. Valid service of process is a prerequisite to personal jurisdiction, and failure to comply with legal requirements of process deprives the court of authority to adjudicate. Here, Plaintiffs had admittedly failed to comply with the requirements set forth in Rules 54.15 and 54.20. In addition, the requirements of §375.906 were not satisfied. The default judgment was void and properly set aside by the trial court on January 24, 2013.

3. <u>Failure of Plaintiffs' Amended Petition to State a Claim</u>.

Plaintiffs' argue on appeal that the trial court had subject matter jurisdiction over Greenwich at the time the default judgment was entered. In its January 29, 2013 Judgment, the trial court did not address this issue because it found a lack of personal jurisdiction over Greenwich at the time of the default judgment. Nevertheless, this was an argument advanced by Greenwich in its amended motion to set aside the default judgment. Greenwich acknowledges that the recent cases indicate that a "failure to state a claim" does not deprive a trial court of subject matter jurisdiction. *See e.g. A.D.D. v. PLE Enterprises, Inc*., 412 S.W.3d 270, 275-80 (Mo. App. W.D. 2013). However, for many years, Missouri courts held that failure to state a claim does so deprive the court of subject matter jurisdiction. *See*

Dobson v. Mortg. Elec. Registration Sys., Inc., 259 S.W.3d 19, 22 (Mo. App. 2008) ("A default judgment cannot be entered on a petition that fails to state a cause of action. If the petition fails to state a cause of action, the trial court has no subject matter jurisdiction, and may take no action except to dismiss it.") (citation omitted); *Harding v. State Farm Mut. Auto. Ins. Co.*, 448 S.W.2d 5, 8 (Mo. banc 1969) (" '[I]f a petition wholly fails to state a cause of action, the defect is jurisdictional and the question may be raised for the first time in the appellate court.' Further, the fact the trial court erred by entering a default judgment on a petition defective on its face does not estop the defendant from appealing.") (citation omitted); *Adkisson v. Dir. of Revenue,* 891 S.W.2d 131 (Mo. banc 1995) ("Failure to state a claim upon which relief can be granted calls into question the authority of the trial court to enter any judgment for the plaintiff. The failure to state a claim is related to subject matter jurisdiction.") (Citation omitted).

Greenwich does not concede Plaintiffs' Amended Petition stated a claim against Greenwich or established the applicability of §375.906. Greenwich acknowledges that recent decisions have held that a petition that fails to state a claim does not deprive the court of subject matter jurisdiction. However, the recent change in the law concerning subject matter jurisdiction when a petition fails to state a claim is not critical to this Court's assessment of validity of the default judgment and the propriety of the judgment setting aside the default judgment. The

default judgment was set aside for lack of personal jurisdiction, rather than subject matter jurisdiction.

4. <u>No Longer Equitable for Judgment to Be In Force</u>.

Although the trial court found a lack of personal jurisdiction over Greenwich and granted Greenwich's motion to set aside the judgment on that basis, a judgment may be affirmed under any theory supported by the record. *In re Estate of Blodgett v. Mitchell*, 95 S.W.3d 79, 81 (Mo. banc 2003). Here, the trial court's judgment setting aside the default may also be affirmed on the grounds that it is not equitable to allow the judgment to remain in force.

While equity will not relieve a party from a mistake if the complaining party, without inducement by the other party, neglects to avail himself of his opportunities for information, a judgment entered without notice to the parties can clearly be set aside as irregular and voidable, if not inherently void, under Rule 74.06(b)(3) and (4). *See Beatty v. Conner*, 923 S.W.2d 455 (Mo. App. W.D. 1996) (judgment entered without due process is void; judgment entered following failure to follow procedural requirements is irregular and voidable). *Clark v. Clark*, 926 S.W.2d 123, 128 (Mo. App. W.D. 1996); *Gibson v. White*, 904 S.W.2d 22, 24-25 (Mo. App. W.D. 1995). Furthermore, an objection to personal jurisdiction or improper service is only waived if defendant defends the case on the merits or seeks affirmative relief prior to raising the issue of personal jurisdiction. *Id*.

Here, Greenwich has at all times maintained that it was not served with proper notice by Plaintiffs, and that the trial court, therefore, lacked personal jurisdiction to enter the default judgment. (L.F. 20). In addition, existing Missouri case law at the time of the default and current case law established that service was insufficient. Moreover, Plaintiffs' actions, rather than the actions of Greenwich, deprived Greenwich of the right to timely assert all deficiencies of the judgment and pursue all avenues of relief from the judgment including appeal by failing to pursue any collection of the default judgment until a full year had passed. (L.F. 4). It is clear from the record before this Court that had Greenwich been properly served with notice of Plaintiffs' lawsuit, Greenwich would have prevailed on the merits of Plaintiffs' claims. (L.F. 80, 106, 108). In fact, Plaintiff Ray Bate testified during the default hearing that he was specifically informed that his employer Cintas, had not purchased underinsured motorist coverage which was the very coverage sought in his lawsuit against Greenwich, Cintas' insurer. (L.F. 11-17; Tr. 7-8). The plain language of the insurance policy which was the basis of Plaintiffs' alleged claims specifically and explicitly provides that no underinsured motorist coverage was purchased or issued for the State of Missouri. (L.F. 80, 106, 108).

Given that Plaintiffs' own actions deprived Greenwich of a trial on the merits and/or a timely appeal of the $3,000,000 default judgment against it, it is inequitable for the default judgment to be reinstated. *See Anderson v. Anderson*,

850 S.W.2d 404 (Mo. App. W.D. 1993). (In *Anderson*, the Court assessed the content and merits of the contested judgment to determine if the party seeking relief from the judgment would have been likely to prevail on a timely appeal from the same decree which the contesting party failed to pursue despite knowledge of his rights). Accordingly, the trial court's judgment setting aside the judgment should, alternatively, be affirmed on this basis.

5. Section 375.906, Without the Additional Requirements of Rules 54.15 and 54.20, Violates Equal Protection.

Alternatively, if this Court were to hold the requirements of Rules 54.15 and 54.20 are not additional requirements to the procedures of §375.906, then §375.906 violates the equal protection provisions of the Missouri and United States Constitutions. A finding of personal jurisdiction over Greenwich and a reinstatement of the default judgment based upon Plaintiffs alleged compliance with §375.906, without the additional requirements of Missouri Court Rules 54.15 and 54.20 being met, would violate Greenwich's Equal Protection under Amendment XIV, Section 1 of the United States Constitution, § 1 and Article 1, Section 2 of the Missouri Constitution .

When read alone, §375.906 provides that foreign insurance companies are not entitled to the same rights and opportunities as those afforded to domestic insurance corporations in that the due process rights and opportunities available to

the latter are greater than those of the former. Domestic insurance corporations are entitled to a summons and petition sent by a plaintiff via certified mail, with return receipt requested, within ten (10) days after service of process upon the Director of the Department of Insurance. Section 375.261. Likewise, unauthorized foreign insurance corporations are entitled to service of process of the same legal force and validity as personal service of process, which requires service via certified mail, with return receipt requested. *Mo. Rev. Stat.* 375.256; 375.261. Therefore, domestic insurance companies and unauthorized insurance companies are each afforded due process which is consistent with or in excess of the minimum standards set by the Rules 54.15 and 54.20.

For service of foreign authorized insurance corporations, however, §375.906 allows that a copy of the petition and summons merely be sent via first class mail from the director of the Department of Insurance, with no assurance that defendant in fact received notice. The service requirements authorized by Missouri statute alone do not afford foreign authorized insurance companies the minimum due process standards set forth by Missouri Court Rules 54.15 and 54.20.

When discrimination against commerce is demonstrated, the burden falls on the state to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake. *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333,

353 (1977). In the case at bar, Greenwich, a foreign authorized insurance corporation, was not served via certified mail. (L.F. 41-42). No return receipt or affidavit was filed with the Court in order to ensure that Greenwich received notice. (L.F. 41-42). The Department of Insurance purportedly mailed a copy of service, summons, and petition via first class mail. (L.F. 41-42). Greenwich was therefore afforded lesser rights, opportunities, and protections with regard to service of due process than those available for domestic or foreign unauthorized insurance corporations. In fact, Greenwich was afforded no notice before a $3,000,000 default judgment was entered.

Missouri does not lack an available, nondiscriminatory alternative to the service procedure set forth in §375.906. In fact, the mere enforcement of Missouri Court Rules 54.15 and 54.20, as additional requirements to those provided within §375.906, would ensure that authorized foreign insurance companies are entitled to the minimal due process standards established by this Court. The deprivation of the minimal due process rights established by this Court for foreign authorized insurance corporations, as compared to domestic and unauthorized insurance companies, constitutes unequal rights and opportunities under the law. Section 375.906 therefore violates the Equal Protection Clause under the Missouri Constitution and United States Constitution.

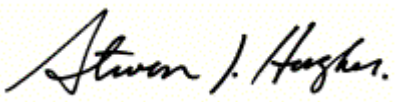
CONCLUSION

It has long been the public policy of this State to favor decisions on the merits in which the parties are afforded an opportunity to present their positions. Default judgments are disfavored. In attempting to have a $3,000,000 default judgment reinstated, Plaintiffs argue that decades of Missouri law should be reversed and the proof of notice requirements of Rule 54.20 should not apply. However due process rights require that reasonable notice be afforded. Rule 54.20 and existing Missouri case law construing Rule 54.20 ensure that due process requirements are satisfied and reasonable notice is provided.

For each of the reasons stated herein, the default judgment entered against Greenwich was void as the trial court lacked personal jurisdiction over Greenwich at the time the default was entered and was properly set aside on January 29, 2013. Alternatively, the January 29, 2013 judgment setting aside the default should be affirmed because the default judgment denied Greenwich due process of law under both the Missouri and United States Constitutions as set forth above. Furthermore, §375.906, without the additional requirements of Rules 54.15 and 54.20, violates the equal protection provisions of the Missouri and United States Constitutions. Alternatively, the default judgment was properly set aside because it is no longer equitable to allow the default judgment to remain in force. For the foregoing

reasons, the judgment entered setting aside the $3,000,000 default judgment against Defendant/Respondent Greenwich Insurance Company should be affirmed.

Respectfully submitted,



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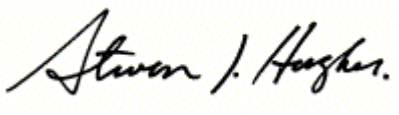
CERTIFICATE OF COMPLIANCE

COME NOW counsel for Defendant/Respondent Greenwich Insurance Company, and for their Certificate of Compliance, state as follows:

1. The undersigned do hereby certify that Defendant/Respondent's Brief includes the information required by Rule 55.03.

2. The undersigned do hereby certify that Defendant/Respondent's Brief complies with the limitations contained in Rule 84.06(b), and contains 10,853 words.

3. Microsoft Word 2010 was used to prepare Defendant/Respondent's Brief.



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was filed electronically with the Clerk of the Court this 24th day of November, 2014 to be served by operation of the Court's electronic filing system upon the following:

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